JUN 1 4 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 152

SOUTHERN PINE ELECTRIC COOPERATIVE, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Southern Pine Electric Cooperative, Petitioner herein, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered on February 4, 1955 (R. 128, Appendix A, *infra*)[1] enforcing an order issued by the National Labor Relations Board, hereinafter called the Board, against Petitioner (R. 60-66).

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[1] The printed record before this Court consists of three separately paginated volumes: (1) Transcript of Record, Volume I, filed by the Board with the court below, herein designated "R.", (2) the Appendix to the Board's brief in the court below, designated herein "B.A.", and (3) the Appendix to the Company's brief in the court below, herein designated "Co. A.".

OPINIONS BELOW

The decision of the Court of Appeals was entered on February 4, 1955, *per curiam* and without opinion (R. 128; Appendix A, *infra*), and is reported in 218 F. 2d 824. The Petitioner's petition for rehearing, filed on February 25, 1955 (R. 130-134), was denied, again without opinion, on March 22, 1955 (R. 136). The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 60-66) are reported at 104 NLRB 834.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1955 (R. 129; Appendix B, *infra*). The Petition for Rehearing (R. 130-134) was denied on March 22, 1955 (R. 136). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the Court may properly enforce an order of the Board directing an employer, *inter alia*, to reinstate employees and bargain with a union where, prior to such enforcement, the Board has announced that it will not assert jurisdiction over such employer and has reversed the decision insofar as the assertion of jurisdiction is concerned.

2. Whether the Board may enforce an order requiring an employer to reinstate employees and bargain with a union where it admittedly would refuse to grant that employer the concomitant rights against union misconduct secured by the Act because of its discretionary rejection of jurisdiction over the employer's operations after the Board's decision issued, but before enforcement was procured.

3. Whether the enforcement of such an order, by imposing on Petitioner obligations under some provisions

of the Act, although it would be deprived thenceforth of rights under others, as well as of recourse to the State courts, constitutes a frustration of the intent of Congress and a denial to Petitioner of its rights under the Fifth Amendment of the Constitution of the United States.

4. Whether the Board may properly conclude that employees who threatened to quit on "two-weeks notice" unless certain conditions were met were engaging in protected concerted activities so as to preclude their employer from accepting their resignations *instanter*.

5. Whether, in the absence of a motive to discriminate, the termination of such employees constitutes interference, restraint, and coercion in violation of Section 8 (a)(1) of the Act.

6. Whether the conduct of an employer in adjusting the basis for stand-by and overtime pay after a union had requested recognition forecloses such employer from insisting that the desires of its employees for union representation be established by a secret ballot election.

7. Whether the record as a whole supports the findings of the Board by substantial evidence and justifies its order.

STATUTES INVOLVED

The statutory provisions principally involved are the National Labor Relations Act, as amended (herein called the Act), (61 Stat. 136, 29 U.S.C., Supp. V, 151 *et seq.*) as set forth in Appendix C, *infra*, p. 2a.

STATEMENT

Following the usual proceedings under Section 10 (c) of the Act, at each appropriate step of which the Petitioner had contended that it was not engaged in commerce within the meaning of the Act (R. 24-27, 28-31, 36, 49-50, 57-59, 104, 112-121), the Trial Examiner on December 30, 1952,

issued his Intermediate Report (R. 70-99). Contrary to the contention of the Petitioner, the Trial Examiner concluded that it "is engaged in operations affecting commerce within the meaning of the Act" (R. 74-75). The Trial Examiner further concluded that the Petitioner had engaged in violations of Section 8 (a)(1), (3), and (5) of the Act (R. 75-91). The Petitioner excepted to the Intermediate Report and to the conclusions that its operations were subject to the Board's jurisdiction and that Petitioner had engaged in violations of the Act (R. 49-59). On May 8, 1953, the Board issued its Decision and Order adopting the Trial Examiner's findings and recomendations with certain modifications by way of elaboration on his conclusions as to the Petitioner's illegal violations of the Act. The Board thus found that Petitioner was engaged in interstate commerce and that to assert jurisdiction over its operations would effectuate the policies of the Act; that Petitioner had violated Sections 8(a)(1) and (3) by its discharge of and refusal to reinstate seven employees; that it had refused to bargain in violation of Section 8 (a)(1) and (5) with the charging party, Local Union No. 676, International Brotherhood of Electrical Workers, A. F. of L., herein called the Union; and that it had unilaterally granted benefits as to overtime and standby pay without consulting the Union in violation of Section 8 (a)(1) and (5) (R. 60-66).

Petitioner is a non-stock, non-profit electric cooperative, incorporated and operating solely in the State of Alabama with its office in Brewton, Alabama. It purchases all its electric energy within the State of Alabama and distributes all its electric energy within that State, largely to farmers in four counties in Southwest Alabama, where it has approximately 6,800 members. During 1951, it sold no power outside of Alabama, but sold $351,799 worth within the State in that year. In 1951, it sold $337,486 worth to farmers and electric power worth $13,312 to industrial users. Of its total purchases of supplies, which amounted to $169,893, it purchased $37,319 worth which

were shipped directly from states other than the State of Alabama. (R. 73-74, B.A. 3)

Contrary to the Petitioner's contention, the Board adopted the following findings of the Trial Examiner (R. 74-75):

> " . . . The Board has held that a cooperative utility of the type involved herein should, for these purposes, be treated as a public utility and that, in accordance with the Board's established policy to take jurisdiction over public utilities, jurisdiction should be asserted. . . . On the basis of the foregoing facts, I find the Respondent is engaged in operations affecting commerce within the meaning of the Act; that its operations are not within the rule of *de minimis;* and that it falls within the class of enterprise over which the Board, as a matter of policy, asserts its jurisdiction,"

relying on *Farmers' Electric Cooperative,* 100 NLRB 746, "and cases cited . . . therein." That case, in turn, relied on *W. C. King, d/b/a Local Transit Lines,* 91 NLRB 623, to justify the assertion of jurisdiction.

On July 2, 1953, the Petitioner filed a Petition for Reconsideration with the Board in this matter (R. 101-104), and on July 22, 1953, the Board denied this Petition (R. 104-105).

On October 31, 1953, the Board issued its decision in *Inter-County Rural Electric Cooperative Corporation,* 106 NLRB 1316, therein changing its policy in regard to asserting jurisdiction over rural electric cooperatives. In that case the Board departed from the jurisdictional plan it had announced in 1950, whereby it asserted jurisdiction over all public utilities, regardless of size, subject only to the rule of *de minimis,* and refused to assert jurisdiction over a small, rural electric cooperative with operations closely paralleling those of the Petitioner.

On November 3, 1953, the Board filed with the United States Court of Appeals for the Fifth Circuit a petition for enforcement of the Board's order against the Peti-

tioner (R. 1-3). Petitioner on November 3, 1953, filed a Petition for Withdrawal of the Petition for Enforcement (R. 112-121), on the ground that the Board had changed its policy in regard to asserting jurisdiction over rural electric cooperatives in the *Inter-County Rural Electric Cooperative* case, cited above.

On June 30, 1954, the Board issued new regulations which materially "changed and delimited the scope of its jurisdiction." *N.L.R.B.* v. *National Gas Co.*, 215 F. 2d 160 (C. A. 8). These rules, set forth in Appendix D, modified the Board's standards for asserting jurisdiction over operations of employers such as the Petitioner, and stated that they would "be applied to pending cases as well as those filed hereafter." Admittedly, the Petitioner's operations do not fall within any of the categories set forth in these new standards.

Also, on June 30, 1954, the Board by order denied the Petition for Withdrawal of the Petition for Enforcement which the Petitioner had filed with the Board on November 3, 1953 (R. 125-126).

On July 15, 1954, the Board issued an additional statement on its newly adopted policy for asserting jurisdiction in which it said:

> "The standards announced today are in addition to the new standards announced by the Board June 30, 1954. Those announced today also modify earlier standards adopted by the Board in October 1950. The changes announced today follow: . . .
>
> "Utility Companies
>
> "C. As to utility companies, such as power, gas, and water companies, and intrastate public transit systems, the Board announced that it would assert jurisdiction over such companies *only if the company does a gross business of $3,000,000 a year or more.*" [Emphasis supplied] (34 LRRM 75-76).

In its decisional application of this policy in *Greenwich Gas Co.*, 110 NLRB No. 91, the Board stated,

> "To the extent that *W. C. King d/b/a Local Transit Lines, supra,* and cases relying thereon are inconsistent with our decision herein, those cases are overruled."

The Board thus expressly overruled its assertion of jurisdiction in the instant case, which relied on *Farmers' Electric Cooperative,* 100 NLRB 746, "and cases cited... therein", among which was the *W. C. King, d/b/a Local Transit Lines* case.

Numerous and complex issues were raised by the Board's decision and order and by the briefs of the Board and the Petitioner both with respect to the Board's enforcement of its order against the Petitioner despite the change in its standards and also with respect to the Board's findings regarding the Petitioner's alleged violations of the Act. Nevertheless, on February 4, 1955, the Court issued a *per curiam* decision in the matter shortly after the argument of the case before the Court on January 25, 1955. This simply stated, "The petition for enforcement of the order of the National Labor Relations Board is granted" (R. 128, Appendix A, *infra*). Thereafter, the Petitioner filed a Petition for Rehearing (R. 130-134) which the Court denied without opinion on March 22, 1955 (R. 136).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred in (1) enforcing the Board's order despite the fact that prior thereto the Board had (a) announced new standards for the assertion of its jurisdiction over pending and future cases whereby admittedly it would not continue to assert jurisdiction over the operations of this employer in the future and had (b) expressly reversed its decision in this case; (2) enforcing *per curiam* the Board's order based on a finding that a threat to quit on "two-weeks notice" constituted protected, concerted activity within the meaning of Section 8 (a) (1) of the Act which precluded the employer from immediately

accepting their resignations; (3) enforcing an order of the Board where, absent substantial evidence of discriminatory motive, an employer was held to have violated Section 8 (a) (1) by terminating immediately employees who had threatened to resign; (4) enforcing an order of the Board requiring an employer to bargain collectively with a union where the employer's lack of good faith doubt as to the union's majority without an election was attributed solely to the adjustment by the employer of the basis for determining the amount of stand-by and overtime pay; and (5) enforcing *per curiam* the order of the Board unsupported by substantial evidence on the record as a whole.

REASONS FOR GRANTING THE WRIT

This Court is respectfully urged to grant the writ for the following reasons:

1. The decision of the court below is in direct conflict with decisions of the Court of Appeals for the Eighth Circuit on the issue of whether the court may enforce an order of the Board against an employer over whose operations the Board had, when enforcement was sought, stated that it would not assert jurisdiction in the future.

2. The propriety of enforcing such an order raises an important question of federal law which has not been decided by this Court and which will continue to occur whenever the Board changes its standards for asserting jurisdiction.

3. The enforcement of the Board's order by the court below has thwarted the intent of Congress in adopting the 1947 amendments to the National Labor Relations Act and deprives the Petitioner of its constitutional rights.

a. It deprives the Petitioner of its rights under the Act while imposing on it the obligations contained in the Act.

b. Because Congress has preempted the field, it deprives the Petitioner of access to the state courts, while denying it a federal forum.

4. The conduct of the employees ordered reinstated by the Board's order was not protected concerted activity within the meaning of the Act.

5. In enforcing the Board's order directing Petitioner to reinstate the employees involved, in the absence of a motive to discriminate on the part of Petitioner, the action of the court below is in conflict with the decisions of this Court and of other Courts of Appeals.

6. The decision of the court below in enforcing the Board's order requiring the Petitioner to bargain with the union without an election presents a federal question of substance in conflict with the decisions of other Courts of Appeals.

7. The *per curiam* decision of the court below, by failing to state its reasons for enforcing the Board's order, has prejudiced the Petitioner and is in conflict with decisions of this Court.

We shall discuss these reasons *seriatim.*

1. The decision of the court below is in square conflict with the decision of the United States Court of Appeals for the Eighth Circuit, issued on August 10, 1954, in *N.L.R.B.* v. *National Gas Co.*, 215 F. 2d 160, a case in which the jurisdictional issues were identical with those in the instant proceeding.

In both cases the Board sought to enforce its order after having, in subsequent decisions, expressly overruled the cases insofar as the assertion of jurisdiction was concerned. Thus, the instant case was overruled in *Greenwich Gas Co.*, 110 NLRB No. 91. There the Board stated:

> "To the extent that *W. C. King, d/b/a Local Transit Lines, supra,* and cases relying thereon are inconsistent with our decision herein, those cases are overruled."

This included the instant case (which relied on "*Farmers' Electric Cooperative, Inc.*, 100 NLRB No. 119, and cases cited in footnotes 4 and 5 therein" (R. 74, n. 4), including the *W. C. King* case). *National Gas* was expressly overruled in *Brooks Wood Products*, 107 NLRB 237, one of the "lead cases" used to set forth its 1954 jurisdictional standards. In refusing to enforce the Board's order in the *National Gas* case the Eighth Circuit said:

> "The Board is asking this court to enforce an order which it entered upon a state of facts which the Board has later expressly held to be insufficient to justify its taking or exercising jurisdiction under the statute from which its powers are derived. The Board held on full consideration in the *Brooks* case, wherein the facts relative to its jurisdiction are indistinguishable from the facts in the present case, that it would not effectuate the policies of the National Labor Relations Act to assert jurisdiction therein, and further held that the decision supporting the action it had taken in this case should be overruled. Embodying that decision, and complementary thereto, the Board on June 30, 1954, issued new regulations which materially changed and delimited the scope of its jurisdiction. . . . It is conceded by counsel for the Board that Respondent does not now come within the scope of the Board's present jurisdictional requirements."[2]

The reasons which led that Court to refuse enforcement of the Board's order where the operations of the Employer did not fall within the Board's current jurisdictional standards were as follows:

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[2] Other cases in which the Board has refused to assert jurisdiction over local rural electric cooperatives with less than the $3,000,000 minimum gross business required under its 1954 standards include *Coles-Moultrie Electric Cooperative*, 107 NLRB 30 (November 10, 1953); *Upshur Rural Electric Cooperative*, 107 NLRB 207 (November 25, 1953); *Cascade Natural Gas Corporation*, 110 NLRB No. 154 (November 24, 1954); *Southern Wyoming Utilities Company*, 110 NLRB No. 190 (December 14, 1954); *Clay Electric Cooperative, Inc.*, 111 NLRB No. 24 (January 10, 1955); cf. *Mississippi Chemical Corporation*, 110 NLRB No. 129.

"Since our duty is to apply the law in its present form, and not as it existed at the time of the decision and order below, Vandenbark v. Owens-Illinois Co., 311 U.S. 538; Carpenter v. Wabash Ry. Co., 309 U.S. 23; Schaff et al. v. R. W. Claxton, Inc., C.A.D.C., 1944, 144 F. 2d 532; Schilder v. Gusik, 6 Cir., 1950, 180 F. 2d 662, we must decline to grant the petition for enforcement.

"The Board, it seems to us, is in the untenable position of asking this court to proceed in a case in which it has precluded itself from proceeding, both by express decision and by the adoption and promulgation of self-limiting rules. An order of enforcement, if granted by this court, would require further action on the part of the Board and respondent employer. But the Board, under its decision that its new regulations shall apply to pending as well as future cases, has specifically denied its jurisdiction over respondent and other employers similarly situated. It could not consistently with the rules it has adopted and published exert its powers to effectuate an enforcement order of this court against the respondent. Such an order and any action of the Board in respect to it would present an arbitrary and capricious discrimination against respondent."

The Eighth Circuit has, since its decision in the instant case, reiterated its refusal to enforce an order based on a decisional standard subsequently abandoned by the Board in *N.L.R.B.* v. *Continental Baking Co.*, — F. 2d —, 36 LRRM 2041 (April 13, 1955), wherein it stated:

"The law to be applied by the reviewing court is the law in its present form and not the law as it existed at the time of the decision appealed from. *N.L.R.B.* v. *National Gas Co.*, 8 Cir., 215 F. 2d 160, 34 LRRM 2694."[3]

[3] In respect to the Court's decision in *Continental Baking, supra*, it is significant that the sole authority cited by the Board for denying the Petitioner's petition for withdrawal of the petition for enforcement was *Wagner Iron Works*, 108 NLRB No. 173, in which the Board stated that it would not reconsider the substantive decisions of a predecessor Board with different membership (R. 126).

There is thus a clear conflict between the decisions of the Eighth Circuit and those of the Fifth. The latter Court's conflicting position is shown not only in the instant case but also in *N.L.R.B.* v. *Red Rock Co.*, 187 F. 2d 76, where under somewhat similar circumstances, that Court said :

> " . . . The fact that by a self-denying rule or order made since this complaint was filed and order entered, the Board has set limits to the exercise in the future of the jurisdiction it possesses is not a matter of which respondent may avail."

There also appears to be a conflict between the decisions of the Eighth Circuit and that of the Ninth Circuit in *Foreman & Clark* v. *N.L.R.B.*, 215 F. 2d 396; cf. *N.L.R.B.* v. *Guy F. Atkinson*, 195 F. 2d 141 (C.A. 9).[4]

2. This conflict between the Circuits on the significant problem of whether the Board may reject future jurisdiction over an employer's operations, but enforce outstanding orders is one of fundamental importance in the operation of the Act. The Board has announced this policy

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[4] In its Reply Brief below (pp. 1-2) the Board contended that the decision of this Court in *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (35 LRRM 2158) decided December 6, 1954, disposed of this issue. Nothing could be further from the fact. The following foot-note was appended to the decision in that case:

> "In *Wilson-Oldsmobile*, 110 NLRB No. 74, 35 LRRM 1062, the Board has applied new jurisdictional yardsticks which would place this case, if now brought, outside them." (n. 16).

An examination of the Petition for Certiorari and all the briefs filed in that case reveal that the issue was never raised before this Court. Indeed, the *Wilson-Oldsmobile* case referred to in the quoted foot-note was not decided until October 26, 1954, *after* the oral argument before this Court on October 18, 1954. Thus the foot-note is the sheerest *dictum*, unrelated to any issue before the Court, and the Board's reliance thereon is at the very least surprising.

as a general one, to be applied whenever its jurisdictional policies shift.[5]

The problem will continue to arise each time a change is made in the membership of the Board. Also, it has arisen in the past and will arise in the future whenever a complete overhaul of jurisdictional policies is effectuated. Thus, an examination of the "lead cases" enunciating or elaborating upon the changes in jurisdictional policy promulgated by regulatory announcement reveals that by no means were the changes in policy effectuated in

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[5] In *Edwin D. Wemyss, d/b/a Coca-Cola Bottling Company of Stockton,* 110 NLRB No. 134, decided November 10, 1954, the Board stated regarding its fluctuating jurisdictional policy:

> ". . . In making these changes, the Board was not motivated by any thought that the Board in adopting the 1950 plan either erred in the exercise of its discretion or acted arbitrarily. Rather we recognize that at that time the Board was properly influenced in its determinations, as we have been in ours, by consideration of all the circumstances prevailing at the time of determination.
>
> "We are also aware that further changes in circumstances may again require future alterations of our own determinations one way or another. The Board's jurisdictional standards are not, and by the very nature of the Board as a quasi-judicial agency charged with the statutory responsibility to effectuate the Congressional purposes embodied in the Act which gave it existence, cannot be, static, immutable standards. From what we have said it is also clear that the present Board had no thought, indeed no valid basis, for overruling prior Board decisions correctly made under jurisdictional criteria in effect at the time of determination.
>
> "Accordingly it was, and is, Board policy for the future, to proceed as follows: The Board will apply the recently announced jurisdictional standards to all future and to all pending complaint cases which have not yet resulted in the issuance of a Decision and Order either finding unfair labor practices or dismissing the complaint. As to all other complaint cases in which a Decision and Order has already issued, the Board will proceed with compliance, enforcement and contempt proceedings, depending upon the status of the case, without regard to whether the particular case meets the revised jurisdictional standards."

unanimous decision of all members of the Board.[6] Generally speaking, Board Member Murdock has dissented in all of the principal cases limiting the Board's jurisdiction under the 1954 standards and he has on some cases been joined in dissent by other of the Board members. Specifically, as the formula has been applied, members Murdock and Peterson have opposed the Board's action in rejecting jurisdiction over the operations of employers which constituted actual instrumentalities of commerce. *The Daily Press, Incorporated,* 110 NLRB No. 64; *Hanford Broadcasting Company* (KNGS), 110 NLRB No. 208. Their dissent in the *Ransom and Randolph Company,* 110 NLRB No. 271, shows the probability of a 2 to 2 deadlock among the Board members on jurisdictional issues upon the end of the term of one of the three members constituting the recent majority therein. A change recently occurred in the Board's membership when Member Leedom was appointed to the vacancy arising upon the

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[6] See, e.g. *Breeding Transfer Company,* 110 NLRB No. 64 (separate opinion by Peterson, Murdock dissenting); *Virgin Isles Hotels,* 110 NLRB No. 65 (Peterson concurring, Murdock dissenting); *Highway Services, Inc.,* 110 NLRB No. 66 (Peterson concurring, Murdock dissenting); *Jonesboro Grain Drying Cooperative,* 110 NLRB No. 67 (Peterson concurring, Murdock dissenting); *Hogue & Knott Supermarkets,* 110 NLRB No. 68 (Murdock and Peterson dissenting); *McKinney Avenue Realty Company,* 110 NLRB No. 69 (Murdock and Peterson dissenting); *Maytag Aircraft Corp.,* 110 NLRB No. 70 (Peterson concurring, Murdock concurring in part and dissenting in part); *Wilson-Oldsmobile,* 110 NLRB No. 74 (Peterson concurring, Murdock dissenting); *Rogers Bros. Wholesalers,* 110 NLRB No. 75 (Murdock and Peterson dissenting); *Greenwich Gas Company,* 110 NLRB No. 91 (Murdock and Peterson dissenting); *Daily Press Inc.,* 110 NLRB No. 95 (Murdock and Peterson dissenting); *Rollo Transit Corporation,* 110 NLRB No. 228 (Murdock and Peterson concurring in part and dissenting in part); *Sixto Ortega d/b/a Sixto,* 110 NLRB No. 251 (Murdock dissenting); *Bickford's Inc.,* 110 NLRB No. 252 (Murdock and Peterson dissenting); *Union Cab Company, Anchorage Alaska,* 110 NLRB No. 259 (Murdock and Peterson dissenting); *Ransom and Randolph Company,* 110 NLRB No. 271 (Murdock and Peterson concurring in part and dissenting in part).

expiration of the term of Member Beeson, who was on the majority side in the 3-2 decisions regarding jurisdictional changes. Thus, Member Leedom will of necessity be a "deadlock breaker" in the present two to two line-up on jurisdictional policy and the result may well be that his vote will bring about a reversal of some of the recent jurisdictional changes. Chairman Farmer's term will end on August 27, 1955. Hence it cannot in any way be said that the problem posed herein will disappear upon the disposition of pending cases. It is very much alive and will ever be haunting employers whose operations are within the scope of the area covered by the Board's constantly oscillating jurisdictional policies. The issue here presented is therefore another example of the perplexing and "delicate problem of the interplay between state and federal jurisdiction touching labor relations" which this Court in the past has believed had "an importance in the federal-state relations regarding industrial controversies" and which is within a "penumbral area" which "can be rendered progressively clear only by the course of litigation." *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. —, (35 LRRM 2637).

3. The enforcement of the Board's order by the court below presents a question of major importance, since it thwarts the fundamental purpose of Congress in amending the Act. The enforcement of the order imposes on the Petitioner continued obligations under the Act, while admittedly it could no longer invoke the jurisdiction of the Board to secure any rights thereunder. Thus it deprives Petitioner and all other persons similarly situated of the equal rights under the laws of the United States to which they are entitled by the Constitution.

a. The amended Act is an integrated piece of legislation intended to be administered as a whole. Congress amended the Act to protect employers and individual employees from illegal conduct by unions as well as to

impose on employers the obligations defined in Section 8 (a) of the Act. The Act's preamble provides:

> "Section I. . . . (b) . . . It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of *both employees and employers* in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference *by either* with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." [Emphasis supplied]

See also *Garner* case, *infra,* at p. 17.

Since it is not disputed that the Board would presently refuse to assert jurisdiction over the operations of this employer, none of the controls which the Act imposes on the conduct of unions under Section 8 (b) could be invoked on its behalf henceforth. Nor would the representation proceeding provided for in the Act be available for a new determination of employee representatives.

b. This Court has said that when the National Labor Relations Board has jurisdiction, Congress has preempted the field, and the Petitioner may not invoke the protection of the State courts and board to regulate conduct within the preempted area. Since the Board has announced its future policy to be to reject jurisdiction over the operations of this employer, it would be futile for the Petitioner to seek such protection. This has placed the Petitioner in a "no-man's land" between Federal and State jurisdiction, where it is subject to its obligations under the former, but deprived of its rights under either. The limitation of State courts to act in the field of labor relations

was clearly set forth by the decision of this Court in *Garner* v. *Teamsters Union*, 346 U.S. 485.[7] It is now well established that " . . . when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded . . ."

c. The Petitioner's objection to the Board's enforcement of its order was timely made. Thus, the position urged by Petitioner is not at variance with the action taken by the United States Court of Appeals for the Sixth Circuit in *N.L.R.B* v. *Dixie Terminal*, — F. 2d —, 35 LRRM 2059, cert. den. 348 U.S. 962, 35 LRRM 2532. There the Court on October 21, 1954, denied a petition of the respondent therein for vacation of judgment entered by the Court against it on February 26, 1954 (210 F. 2d 538, cert. den., 347 U.S. 1015), because of subsequent changes in the Board's jurisdictional standards announced on July 1, 1954. The Court held that the reason advanced was "not sufficient grounds to vacate the judgment in this case in which jurisdiction was asserted by the Board and *sustained by the Court* prior to the Board's change of policy on July 1, 1954." [Emphasis supplied].[8] Since the request for vacation of judgment for the first time raised the issue of the shift in the Board's jurisdictional policy after the Board's order had been enforced by the Court, the case fell within the decision of this Court in *Mine Workers* v. *Eagle-Picher*, 325 U.S. 335, cited by the Sixth

[7] See also *Bethlehem Steel Co.* v. *N.Y.L.R.B.*, 330 U.S. 767; *Weber* v. *Anheuser-Busch, Inc., supra; General Drivers, Local Union 89* v. *American Tobacco Co.*, 348 U.S. 962 decided April 4, 1955.

[8] Similary, the Fifth Circuit, on October 16, 1954, denied a Motion to Modify Injunctive Decree, 215 F. 2d 959, in *N.L.R.B.* v. *Concrete Haulers, Inc.*, 212 F. 2d 474.

Circuit.[9] As noted in the *Dixie Terminal* case, the "judgment with respect to jurisdiction and liability of the respondent became final prior to the change of policy on the part of the Board."

But in the instant case the changes in the Board's jurisdictional policy, both decisional and regulatory, had been made prior to the enforcement proceeding and the decision of the court below. Therefore, as the Eighth Circuit said in the *National Gas* case, it is the law as it presently exists which must determine the propriety of such initial enforcement. Here there was no request that the court below reconsider a former determination or modify a mandate which had issued. Therefore, the reasoning behind the *Mine Workers* and *Dixie Terminal* cases has no application. Here enforcement of the Board order which the Petitioner opposed in the court below was merely the next step in the statutory scheme. See *L. A. Young Spring & Wire Corp.* v. *N.L.R.B.*, 163 F. 2d 905 (C.A.D.C.) and cases cited at p. 907 therein.

In short, an issue of real significance has been raised by the failure of the court below to apply the Board's own current jurisdictional standards and deny the petition for enforcement of its order since under those standards the Board will not presently assert jurisdiction over operations such as those here involved, and the Court was

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[9] That case applies only to post mandate requests for the modification of decrees already issued. There this Court said:

> "Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction. This does not mean that the Board could not frame an order which by its terms required modification should conditions change. But here the order was definite and complete; it contemplated only arithmetical computation. . . .
>
> "We are dealing here with a decree of a court entered in a judicial proceeding. The term at which the decree was entered has long since expired. The only recourse open to the Board is the same that would be open to any other litigant, namely a bill of review."

obliged therefore to apply the law as it existed when enforcement was sought to effectuate the policies of the Act (Section 10 (c)). The action of the court below in granting enforcement of the Board's petition has resulted in an arbitrary selection of Petitioner from other employers in the same category and has subjected it to obligations under only one portion of a statutory scheme which Congress intended to be integrated in its enforcement, while at the same time depriving it of its privileges both under that Act and in the state courts. This is at variance with both the Act and the Constitution.

4. The Board found the employees here involved to have been discharged because of "a threat to quit in the future" (R. 611), which threat it found to constitute protected concerted activity within the meaning of Section 8 (a) (1) of the Act. Assuming the correctness of the Board's finding that the termination constituted a discharge, the court below, in enforcing the order, committed a serious error of law. The Board did not ask enforcement of its order insofar as its findings established a violation of Section 8 (a) (3) of the Act, which proscribes discrimination for *union* activities. It asked enforcement of its order only on the basis of findings (R. 62) that the termination of the employees constituted interference, restraint and coercion with the employees in their right to engage in protected concerted activities, in violation of Section 8 (a)(1) of the Act. The only activity found to be such was their "threat to quit in the future".

This, we submit, was not the concerted activity Congress intended to secure by Section 7 of the Act. Indeed, the Board itself reached a different conclusion on facts so similar to those here presented as to make its distinction between the two cases an instance of decisional arbitrariness which cannot be sustained.

On May 8, 1953, the date of the Board's decision herein, it also issued a decision in *Crescent Wharf and Warehouse Company,* 104 NLRB 860, on substantially indistinguish-

able facts. The Board's antipodal conclusions in these two cases constituted decisional inconsistency to the point of abuse of discretion. In both cases, the Board found employees were dissatisfied with wage increases given them. In the *Crescent Wharf* case, the employees, on April 3, 1952, informed their employer in writing, "This is to notify you that the undersigned tender their resignations as of April 15th, 1952, in lieu of satisfactory cost of living increases." In the case at bar, the employees on January 17, 1952, told their employer that "they would resign on the first of the following month unless something was done in the meantime about their increases" (R. 78). In both cases, the employer accelerated the termination of the employees prior to the deadline date given by the employees. In each proceeding, the employees then sought to withdraw their resignations. As to the action taken by the employees in the *Crescent Wharf* case, the Board construed "the letter of April 3 as a *present* resignation rather than a threat to resign. . . . The action of the 6 employees was, therefore, not the kind of concerted activity which Section 7 protects. As this activity was unprotected we do not find that the Respondent Crescent violated Section 8 (a)(3) and (1) of the Act when it accepted the resignation or replaced the employees who signed the notice. . . . " However, in the instant case, the Board found that the action of the employees "did not amount to a voluntary termination of employment by the employees, but rather was merely a *threat* to quit in the future, designed to induce the Respondent to act favorably regarding their wage demand. As such, it constituted concerted activity for their mutual aid and protection, within the meaning of Section 7 of the Act" and that Petitioner's acceptance of their resignations was violative of Section 8 (a)(3) and (1) of the Act. (R. 61).[10]

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[10] As noted above, the Board did not seek enforcement of its Order insofar as it was based on a violation of Section 8 (a)(3).

The distinction between the situations found by the Board in the two cases has no validity and accordingly the court below should have denied the Board's petition for enforcement since "consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily." *N.L.R.B.* v. *Mall Tool Co.*, 119 F. 2d 700 (C.A. 7).

5. The court below, in enforcing the order directing the reinstatement of the employees involved, departed from its own decisional precedents and those of this Court by reinstating employees in the absence of substantial evidence that the employer had any motive to discriminate against them because of the activities found by the Board to be protected. The fact that reinstatement is ordered on the basis of a finding of interference with protected concerted activities rather than of a finding of discrimination for *union* activities, cannot eliminate the necessity for establishing a discriminatory motive. This Court has said: "The relevance of the motivation of the employer in such discrimination has been consistently recognized." (*Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 43). In its Reply Brief to the court below (p. 6), the Board maintained that motive was irrelevant in determining whether discharges were interference, restraint and coercion with protected rights. The absence of a decision by the court below makes it difficult to determine the basis for its conclusions. However, it must have agreed with the Board's contention that the employee's were discharged, rather than that they quit, as Petitioner contended. But to establish a violation by discharging them, such discharge must, under the precedents, have stemmed from the employer's motive to discriminate against them because they engaged in activities protected by the Act. See *N.L.R.B.* v. *Tex-O-Ken Mills*, 122 F. 2d 433 (C.A. 5); *Rubin Bros. Footwear, Inc.* v. *N.L.R.B.*, 203 F. 2d 486 (C.A. 5); *Southern Oxygen* v. *N.L.R.B.*, 213 F. 2d 938 (C.A. 4); *N.L.R.B.* v. *Kaiser Aluminum & Chemical Corp.*, 217 F. 2d 366

(C.A. 9); *Boeing Airplane Co.* v. *N.L.R.B.*, 217 F. 2d 369 (C.A. 9).

The Board does not even contend that the employer had knowledge of any *union* activity prior to the terminations. It bases its finding of "resentment" of their group action by the Employer solely on the Petitioner's refusal to deal with them as a group (R. 84). This, in the absence of a majority designated representative, the employer had every right to do, and it cannot be used as the basis for finding "hostility", and hence "motive", even assuming that their common threat to quit, as found by the Board, constituted protected concerted activities under the Act. It is too well settled to require citation that, assuming the terminations to have been dicharges, they can only be violative of the Act if they were because of union or other protected concerted activity. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34; *Associated Press* v. *N.L.R.B.*, 301 U.S. 103; *Radio Officers* case, *supra*. The court below, by enforcing the Board's order, must have reached a contrary conclusion. Its failure to spell out the reasons for this conclusion, one which was necessary to sustain its decision, makes such decision no less in conflict with the decisions of this Court and no less significant a conflict.

6. The enforcement of the Board's order requiring the Petitioner to bargain with the Union presents a question of great importance since it represents an extreme departure from the well defined limits within which the Board will require an employer to bargain with a union without requiring a secret ballot election to determine that union's majority. We do not question the Board's legal right to determine a union's majority by authorization cards or other means. But under a long established decisional practice the Board will only deny an employer the right to insist on an election where its conduct shows that its insistence on an election was not motivated by a good faith doubt as to the uion's majority, but was for the purpose

of delay or to undermine the union. *Artcraft Hosiery Company*, 72 N.L.R.B. 333.[11]

Yet here, solely because of the employer's conduct in adjusting the basis for stand-by and overtime pay, months after the Petitioner had informed the Union that it desired an election before it would grant recognition, the Board held such conduct to deprive the Petitioner of the right to the election upon which it could otherwise have insisted under this established doctrine (R. 62, 88-89). The court below, in enforcing the portion of the Board order based on a finding of a violation of Section 8 (a) (5) of the Act under such circumstances, displayed a significant departure from the established decisional standards of both the Board and the Courts. It is also clearly in conflict with the contrary conclusion of the Second Circuit in *N.L.R.B.* v. *James Thompson & Co.*, 208 F. 2d 743, and of the Seventh Circuit in *N.L.R.B.* v. *Jackson Press, Inc.*, 201 F. 2d 541.

7. In granting the Board's petition for enforcement of its order and in denying the Petitioner's petition for rehearing, both without stating its reasons therefore, the court below erred. Such error is particularly damaging, inasmuch as the abbreviated summary of the issues in the case heretofore stated demonstrates that the Board's findings and order in this case involved not only novel and important questions of law with respect to the momentous

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[11] See also *Beaver Machine & Tool Co., Inc.*, 97 NLRB 33; *Industrial Stationery & Printing Company*, 103 NLRB 1011; *The Walmac Co.*, 106 NLRB 1355; *Page Boy Company, Inc.*, 107 NLRB 126; *Poe Machine & Engineering Co.*, 107 NLRB 1372; *Blue Flash Express, Inc.*, 109 NLRB No. 85; *North Electric Manufacturing Company* v. *N.L.R.B.*, 123 F. 2d 887 (C.A. 6); *N.L.R.B.* v. *Jackson Press, Inc.*, 201 F. 2d 541 (C.A. 7); *N.L.R.B.* v. *James Thompson & Co.*, 208 F. 2d 743 (C.A. 2); *Mt. Hope Finishing Co.* v. *N.L.R.B.*, 211 F. 2d 365 (C.A. 4); *American Rubber Products Corp.* v. *N.L.R.B.*, 214 F. 2d 47 (C.A. 7) Cf. *Celanese Corporation of America*, 95 NLRB 664; *N.L.R.B.* v. *Parkside Hotel*, 179 F. 2d 15 (C.A.D.C.); *D. H. Holmes* v. *N.L.R.B.*, 179 F. 2d 876 (C.A. 5); *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732 (C.A.D.C.); *N.L.R.B.* v. *John Deere Plow Co.*, 187 F. 2d 26 (C.A. 5); *N.L.R.B.* v. *Stewart Oil Co.*, 207 F. 2d 8 (C.A. 5).

jurisdictional issue, but also raised a grave question as to the arbitrariness of such order as reflected by the inconsistency of the decisional policy which led to the Board to reach conclusions in this antipodal to those in the *Crescent Wharf* case and contrary to precedents heretofore well-established by the Board and the courts in the cases cited. Cf. *Virginian Railway* v. *United States*, 272 U.S. 658, 674-675; *N.L.R.B.* v. *Donnelly Garment Co.*, 330 U.S. 219, 237.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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June 17, 1955

APPENDIX A

Opinion of the Court — Filed February 4, 1955.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14810

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

VERSUS

SOUTHERN PINE ELECTRIC COOPERATIVE, *Respondent.*

Petition for the Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(February 4, 1955.)

Before HOLMES and BORAH, *Circuit Judges,* and DAWKINS, *District Judge.*

PER CURIAM:

The petition for enforcement of the order of the National Labor Relations Board is granted.

APPENDIX B

Judgment

Extract from the Minutes of February 4, 1955.

No. 14810.

NATIONAL LABOR RELATIONS BOARD,

VERSUS

SOUTHERN PINE ELECTRIC COOPERATIVE.

This cause came on to be heard on the petition of the National Labor Relations Board for the enforcement of an order of the National Labor Relations Board, made on

May 8, 1953, "In the Matter of Southern Pine Electric Cooperative and Local Union No. 676, International Brotherhood of Electrical Workers, AFL," Case No. 15-CA-440, and was argued by counsel;

On consideraton whereof, It is now here ordered, adjudged and decreed by this Court that the petition for the enforcement of said order of the National Labor Relations Board in this cause be, and the same is hereby, granted and the order enforced.

APPENDIX C

The pertinent provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151 *et seq.*) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"Unfair Labor Practices

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"Sec. 10. . . . (c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .

* * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practices in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or

in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)."

APPENDIX D

". . . The National Labor Relations Board today announced seven changes in its standards for determining whether the Board will take jurisdiction of a case. The earlier standards were adopted in October 1950.

"The Board has discretion to decide in which cases, of those affecting interstate commerce, it will exercise jurisdiction.

"The changes are:

"A. The Board increased the amount of direct outflow of interstate business required to bring a company under its jurisdiction, from $25,000 a year to $50,000 a year.

"B. The Board increased the amount of goods or services that must be supplied to interstate companies to bring the supplier under the Board's jurisdiction, from $50,000 a year to $100,000 a year.

"C. The Board established a requirement that the goods supplied by firms under paragraph B above ultimately go outside the state or the services supplied be part of the stream of interstate commerce. (There was no such requirement in the former standards.)

"D. The Board established a requirement that intrastate trucking companies and similar firms which are 'links in interstate commerce' do at least $100,000 a year business for other interstate firms in order to come under Board jurisdiction. (The former standards did not contain any dollar criterion in this category.)

"E. Jurisdiction will not be exercised over general or public office buildings merely because they have tenants over which the Board exercises jurisdiction.

"F. A franchise from a national enterprise will not be sufficient in and of itself to bring a company under the Board's jurisdiction.

"G. The Board abolished the 'combination category'. Jurisdiction will not be determined by combining the percentages which a company has in each of the dollar volume categories.

"The Board announced that these changes in its jurisdictional standards will take effect immediately. *The new standards will be applied to pending cases as well as those filed hereafter.*" [Emphasis supplied.] (34 LRR 223).